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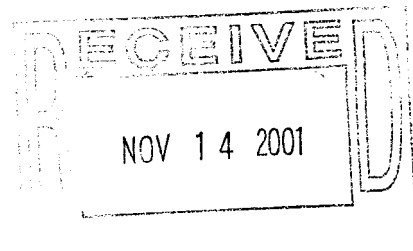
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Dear Ms. Terbush:

On behalf of the more than 7 million members and constituents of The Humane Society of the United States (HSUS), I am submitting comments on the proposed rule to amend the regulations for permits to capture or import marine mammals for the purpose of public display, as published in the *Federal Register* on July 3, 2001 (66 FR 35209). Overall, The HSUS supports the efforts of the National Marine Fisheries Service (NMFS) to clarify its requirements for permit holders. The HSUS strongly believes that the NMFS has full authority to regulate these aspects of capture, import/export, and inventory-related record-keeping under the Marine Mammal Protection Act (MMPA) and that these regulations in no way duplicate the care and maintenance regulations of the US Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) under the Animal Welfare Act (AWA).

The HSUS supports many aspects of this proposed rule, as we believe these requirements will provide better protection to captive marine mammals. However, there are some elements of the proposed rule to which The HSUS has objections. First we will enumerate the elements that we strongly support and then we will discuss those to which we object.

THE HSUS SUPPORTS:

Prohibition of intrusive research without a scientific research permit

The HSUS strongly supports the proposed requirement, found in §216.43(a)(3), for a separate scientific research or enhancement permit if intrusive research is to be conducted on captive marine mammals. The MMPA may have limited authority over captive marine mammals under the 1994 Amendments, but captive marine mammals remain subject to other provisions of the MMPA outside of those pertaining to public display. Invasive research on marine mammals requires a permit; a public display

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facility's proprietary control of its collection of marine mammals does not extend to those activities that require separate authorization. Therefore, it is appropriate for NMFS regulations to clarify that a separate permit must be obtained to proceed with invasive research.

Right of inspection

The HSUS strongly supports the proposed provisions under §216.43(a)(4)(i) and (ii) that provide for inspections of public display facilities by NMFS personnel. We believe there are situations, particularly where seizure of animals may be required, when inspection by the NMFS under its MMPA authority (aside from any inspection authority held by APHIS under the AWA) may be necessary. Such inspections should be specifically provided for in regulations.

Capture permit requirements

The HSUS supports the requirement under §216.43(b)(3)(v)(B) wherein capture permit applicants must determine that a capture from a stock, where no quota is in effect, will not have a significant direct or indirect adverse effect on the stock. We note, however, that this provision does not specify what exact information would satisfy this requirement. The "best available information" standard has proven problematic in the past. We recommend that the NMFS include examples of information that would satisfy this requirement, as we believe that captures in the past have in fact been permitted even though they had significant adverse impacts on stocks. We also recommend the explicit inclusion in this section's regulatory language of the statutory requirement that a capture (take) be conducted in a humane manner.

Marine Mammal Inventory

The HSUS strongly supports the maintenance of the Marine Mammal Inventory as required under the MMPA. The information contained in the inventory is essential to ensuring a minimum level of protection for captive marine mammals. Nations that do not require the maintenance of an inventory sorely feel the lack. Until recently, for example, Mexican public interest groups and the Mexican government had no idea how many captive dolphins were held in their country. They had no idea what the mortality, birth, or survivorship rates were. Through the efforts of non-governmental organizations, an inventory was painstakingly put together that demonstrated that the situation for captive dolphins in Mexico is relatively grave. There are a far greater number of animals in captivity than anyone was aware of and the origins of many are controversial (*e.g.*, wild-caught from unstudied populations; traded from other countries without adequate paperwork). Mortality rates in some facilities are excessive. Without a central inventory that includes births, deaths, and stillbirths, the overall status and health of captive marine mammals in a country may be impossible to determine. This obviously impacts directly on a government agency's ability to regulate the holding of marine mammals in captivity for their maximum protection.

Other provisions

The HSUS supports or has no opinion on all other provisions in the proposed regulations, except as noted below.

THE HSUS OBJECTS:

Permanent vs. temporary release

As stated above, overall the proposed rule contains elements that clarify requirements and do much to ensure that the greatest protection possible under the MMPA will be afforded to captive marine mammals under the NMFS' jurisdiction. However, The HSUS strongly objects to a biased tendency of these proposed regulations, found primarily in §216.13(d) and §216.43(a)(5), which strongly implies that it is appropriate to release captive marine mammals into the open ocean if the purpose is to train them for pinger recall but it is *not* appropriate if the purpose is to return them to the wild after rehabilitation.

While these two purposes are obviously widely divergent, the potential risks described in the supplemental language (p. 35210, column 3) as associated with permanent releases of captive marine mammals to the wild apply equally well to temporary releases for pinger recall training. Whether release is permanent or temporary, it poses the risk of "[introducing] contagious diseases, [disrupting] essential social structures, [passing] on behaviors acquired in captivity that can be harmful in the wild, and [altering] the genetic composition of wild populations," especially in cases where animals intended to be released only temporarily nevertheless remain at large for days and even weeks before being successfully recalled. Certainly temporary release for recall training sets the stage for an "inadvertent escape," where the animal is never successfully recalled and thus becomes a de facto permanent release.

While the discussion of permanent releases strongly emphasizes these risks, the discussion of temporary releases merely refers to the previous discussion and implies that pinger recall training is a better justification for these risks than returning an animal to its natural habitat. These discussions lead to a subtle double standard – the potential risks of release are presented as somehow more justified in the case of pinger recall training than in the case of rehabilitating and returning captive marine mammals to the wild.

The HSUS does not object to the proposal to require a scientific research permit for permanent releases to the wild. We accept that at this time permanent release of captive marine mammals is considered experimental by several researchers and agency officials and we believe that a clear permit requirement will deter rash releases of animals that have not been properly rehabilitated. However, we strongly object to the biased language that accompanies this proposal, where the

application of a double standard implies that somehow the risks involved in returning wild animals to their natural habitat are greater than those involved in keeping them dependent on human caretakers. This language raises the specter of biased consideration, where scientific research permit applications for permanent release projects might not receive fair and objective consideration, while requests for approval for pinger recall training might be granted without sufficient consideration.

The HSUS urges the NMFS to revise its discussion of permanent and temporary releases. We recognize the possible value of allowing certain facilities to train their animals for recall, should, for example, temporary releases due to natural disaster be necessary. However, we believe the risks described in the supplemental language on p. 35210 apply equally to both temporary and permanent releases – and are not necessarily prohibitive in either case – and urge the NMFS to clarify this to the strongest degree possible in its final rule.

The HSUS also notes that the risk of disrupting essential social structures, as listed on p. 35210, also applies to the capture of wild marine mammals. While we recognize that the MMPA allows captures for public display, again we consider the description of this risk solely in the context of permanent release to the wild when it applies equally well to capture to be biased and indicative of a double standard. We urge the NMFS to avoid such biased references in the final rule.

Retaining releasable stranded marine mammals for public display

The HSUS strongly objects to the proposal to allow the retention for the purpose of public display of stranded marine mammals that have been determined to be releasable, in lieu of a direct capture from the wild. While we understand the logic behind this proposal (reducing the need to capture healthy marine mammals), we are concerned about public perceptions of such a provision. In the past, animals determined to be non-releasable have been retained for public display – the controversy surrounding these determinations has been, in some cases, extreme. Retaining *releasable* animals may result in even greater controversy and may in fact cause members of the public who support public display to object. The American public strongly supports the rescue of stranded marine mammals – when people learn that stranded animals, who survive and recover their health against all odds, may be rewarded with a lifetime in captivity rather than a return to their natural habitat, this support may erode.

A related phenomenon has been observed by animal shelter professionals, who find that many otherwise well-meaning members of the general public would rather allow a stray dog or cat to remain at large (and in danger of injury, disease, and starvation) than risk consigning it to possible (albeit humane) euthanasia by bringing it to the local shelter. If people who encounter a stranded marine mammal realize that rescuing it may mean the animal spends the rest of its life

in a tank, even if they support public display overall, they may think twice about reporting it to the local stranding network.

The public display industry has promoted its marine mammal breeding programs for years. Facilities report the fact that they have not had to capture any wild marine mammals in recent years as a sign of their successful attempts at breeding these species. The HSUS therefore does not see a need at this time for a proposal to retain releasable stranded marine mammals. Non-releasable marine mammals and captive-bred animals (obtained domestically and through imports) seem sufficient for now to supply the collection needs of US marine mammal facilities.

In a related comment, The HSUS believes the proposed requirement to attach a public comment period to a request to retain a non-releasable marine mammal “*at a facility that has not previously held marine mammals for public display*” [§216.27(c)(4) – emphasis added] should be expanded to include *all* facilities making such a request. The retention of non-releasable stranded marine mammals has, as noted above, been controversial in the past. A public comment period would allow knowledgeable individuals to examine the history and status of the animal(s) in question and provide useful input to the NMFS when the agency makes its decision on whether to grant such a request. Under no circumstances should the NMFS allow non-releasable stranded marine mammals (or stranded marine mammals in the process of being rehabilitated) to be publicly displayed for a fee at facilities that are not licensed by APHIS and that do not comply with the public display permit requirements under the MMPA **as** outlined in §104(c)(2)(A).

Issuance criteria

Section 216.43(a)(3) sets forth the criteria that a permit applicant must meet to qualify for a permit. Section 216.43(a)(3)(i) specifies the requirement for an education or conservation program that complies with “professionally recognized standards of the public display community.” The NMFS *must* specify in these regulations what those standards are. Such standards exist and are codified as guidelines by the American Zoo and Aquarium Association and the Alliance of Marine Mammal Parks and Aquariums. The lack of government-enforceable standards for education programs can and must be corrected through this rulemaking. **As** the failure to maintain a “professional standard” education program is grounds for revocation of a public display permit and even seizure of animals, the basic elements of what constitute such a program must be delineated in regulations.

Expiration of authorized period

The HSUS recommends an amendment to the provision in §216.43(b)(4)(iv), which states that “If the capture or import does not occur during the period initially authorized, the Office Director may extend the authorized period upon request of the permit holder.” This provision appears to allow an unlimited series of extensions. The HSUS recommends that the provision be amended

to allow for an expiration of the authorized period, after which a new application for capture or import must be made. Conditions change over time; for example, a determination that a capture will not have an adverse impact may no longer be valid after some period of time passes, due to changes in, *inter alia*, a stock's habitat or population parameters.

Exceptions to 15-day notification

The HSUS recognizes that there may be times when ~~an~~ exception may be necessary to the 15-day notification requirement, such as a medical emergency. However, on p. 35212 (column 3), the supplemental language suggests that a "time critical business opportunity" would qualify for a waiver of the 15-day notification requirement. The HSUS strongly objects to this suggestion – clearly the MMPA does not protect business opportunities but rather marine mammals. The only exceptions to MMPA requirements should be when the welfare of an animal is at stake.

Submitting information to the International Species Information System (ISIS)

The HSUS has some concerns about the proposed reporting requirements. Looking at Table 1 of \$216.43, while this submission schedule may make sense from the NMFS' point of view, from the public display industry's perspective, it probably seems more complicated than not. While The HSUS recognizes that such a division of reporting requirements may make information processing easier or more efficient for the NMFS, we also recognize that anything that makes reporting more difficult (even perceptually) for the regulated parties may result in reduced or delayed reporting. We fully support the reporting requirements found in this proposed rule; therefore, we strongly recommend that the NMFS simplify these requirements from the industry's perspective to the maximum extent possible, in the interest of maximizing the probability of prompt and accurate reporting. All information and forms should be submitted directly to the NMFS. The agency can then be responsible for passing along the appropriate information to ISIS.

LETTER OF COMITY

The NMFS is specifically requesting comment on the requirement for a letter of comity from countries receiving marine mammals exported from the US. The HSUS fully agrees with the NMFS that, under MMPA §§104(c)(2)(C), 104(c)(2)(D), and 104(c)(9), "Congress intended that any person receiving marine mammals via export meet standards comparable to the public display requirements of the MMPA" (p. 35213, column 3). The NMFS is responsible for determining comparability and has decided that a letter of comity from the receiving facility's government is the most reasonable means of doing so. In contrast, The HSUS believes that a letter of comity is the *minimum* and least reliable means of doing so.

Few countries have regulations comparable to the US' under the MMPA and the AWA. Nevertheless, several governments have issued letters of comity in the last few years upon request from the NMFS when an export is pending. The HSUS fully believes that some of these letters have made unsupported claims of comparability; however, we recognize that the NMFS accepts such letters in good faith. Hence our conclusion that a letter of comity is the minimum means by which the NMFS can comply with its mandate under the MMPA regarding exports and comparability.

Given recent cases of marine mammal exports to countries that do not in fact have comparable standards (the most notable being the export of 12 dolphins from a defunct facility in Florida to Honduras and of two dolphins from a defunct facility in S. Dakota to China – in both cases, the fate of the animals is either unknown or known to have been injurious or fatal), The HSUS believes that additional efforts to verify comparability and maximize the probability of adequate care of exported marine mammals are necessary. We totally reject the argument that such additional efforts, including surety bonds and on-site inspections, would infringe on a receiving nation's sovereignty. Such efforts do not impose our laws or requirements on other nations. As long as the marine mammals in question are still in the US, they are under US jurisdiction. It is fully within the rights of the US (and does not impose on the receiving nation's sovereignty) for a US agency to verify that a receiving facility will adequately care for the animals. If such a determination cannot be made, no penalty accrues to the receiving facility, because of course the US cannot enforce its laws in another country. The receiving facility simply will not receive the animals, which are still within US jurisdiction and subject to US law.

At a minimum, the NMFS must maintain the requirement for a letter of comity before authorizing an export. However, The HSUS strongly recommends additional requirements as noted above (including a surety bond and on-site inspections), none of which we perceive to exceed the NMFS' authority under the MMPA and its Congressional mandate to determine comparability of receiving facilities.

TRAVELING SHOWS

While The HSUS appreciates the clarification in the proposed regulations that would require traveling shows to meet the same standards as permanent public display facilities, we would like to state for the record that we believe traveling marine mammal shows (including "circus seal" performances) should be prohibited under the MMPA.

CAPTURE FROM THE WILD

Similarly, The HSUS firmly believes that MMPA-permitted captures from the wild of marine mammals for the purpose of public display have in the past been detrimental to local populations of dolphins. In addition, data compiled by NMFS biologists (Small and DeMaster 1995) indicate

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that mortality risk sharply increases immediately after a capture, suggesting that the individual welfare of marine mammals is not adequately protected during capture operations. In short, the risks to marine mammal stocks and to individual marine mammals posed by capture are significant. The HSUS believes that these risks are not justified by the purported educational benefit of public display. Therefore, we will continue to work for a prohibition on captures for the purpose of public display during the upcoming MMPA re-authorization.

CONCLUSION

The HSUS commends the NMFS for publishing this proposed rule. The US Fish and Wildlife Service, which is currently dealing with a number of controversial permits, permit applications, and facilities holding or seeking to hold sea otters and polar bears for the purpose of public display, should follow the NMFS' example – in fact, The HSUS believes the NMFS and FWS should coordinate their regulatory efforts as much as possible. However, there are a number of elements in this proposed rule about which we have serious concerns. We urge the NMFS to take these concerns into consideration when finalizing this rule.

The HSUS is aware that several other environmental and animal protection groups have submitted comments on this proposed rule. We would like to endorse and incorporate by reference the comments submitted by Earth Island Institute, particularly those regarding legal and legislative issues.

Thank you for the opportunity to comment on this important matter.

Sincerely,

Naomi A. Rose, Ph.D.
Marine Mammal Scientist
Wildlife and Habitat Protection

Cc: Robert H. Mattlin, Executive Director, Marine Mammal Commission

REFERENCES:

Small., **R.J.** and D.P. DeMaster. 1995. Acclimation to captivity: a quantitative estimate based on survival of bottlenose dolphins and California sea lions. *Mar. Mamm. Sci.* 11:510-519.